

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PHILIP LOUIS MACHADO, CDCR #AY-5433, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">v.</div> CITY OF OCEANSIDE; JENNIFER TORRES; STEVE REGALADO <div style="text-align: right;">Defendants.</div>		Case No. 16-cv-1684-BAS-KSC ORDER: (1) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS [ECF No. 2] (2) DISMISSING COMPLAINT FOR FAILING TO STATE A CLAIM PURSUANT TO 28 U.S.C. § 1915(e)(2) AND § 1915A(b)
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Plaintiff, Philip Louis Machado, is an inmate at Mule Creek State Prison, located in Ione, California. He has filed a Complaint pursuant to 42 U.S.C. § 1983, and requests leave to proceed in forma pauperis (“IFP”) (ECF No. 2). Because Plaintiff’s Motion to Proceed IFP complies with 28 U.S.C. § 1915(a)(2), the Court grants him leave to proceed without full prepayment of the civil filing fees required by 28 U.S.C. § 1914(a). However, the Court also dismisses the Complaint for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b).

I. Plaintiff’s Motion to Proceed IFP

All parties instituting any civil action, suit or proceeding in a district court of the

United States, except an application for writ of habeas corpus, must pay a filing fee of \$400.¹ *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff's failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to proceed IFP remains obligated to pay the entire fee in "increments" or "installments," *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a "certified copy of the trust fund account statement (or institutional equivalent) for . . . the 6-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner then collects subsequent payments, assessed at 20% of the preceding month's income, in any month in which his account exceeds \$10, and forwards those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

In support of his IFP motion, Plaintiff has submitted a copy of his inmate trust account activity. *See* ECF No. 2 at 5; 28 U.S.C. § 1915(a)(2); S.D. Cal. Civ. L.R. 3.2;

¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2014)). The additional \$50 administrative fee does not apply to persons granted leave to proceed IFP. *Id.*

1 *Andrews*, 398 F.3d at 1119. This statement shows that Plaintiff's current available
 2 balance is zero (ECF No. 2 at 6), and it appears Plaintiff is unable to pay any initial fee at
 3 this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be
 4 prohibited from bringing a civil action or appealing a civil action or criminal judgment
 5 for the reason that the prisoner has no assets and no means by which to pay [a] initial
 6 partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a
 7 "safety-valve" preventing dismissal of a prisoner's IFP case based solely on a "failure to
 8 pay . . . due to the lack of funds available to him when payment is ordered"). Therefore,
 9 the Court grants Plaintiff leave to proceed IFP, declines to "exact" any initial filing fee
 10 because his trust account statement shows he "has no means to pay it," *Bruce*, 136 S. Ct.
 11 at 629, and directs the Director of the CDCR to collect the entire \$350 balance of the
 12 filing fees required by 28 U.S.C. § 1914 and forward it to the Clerk of the Court pursuant
 13 to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1). *See id.*

14 **II. Initial Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

15 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre
 16 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
 17 statutes, the Court must sua sponte dismiss a prisoner's IFP complaint, or any portion of
 18 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
 19 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
 20 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
 21 2010) (discussing 28 U.S.C. § 1915A(b)). "The purpose of [screening] is 'to ensure that
 22 the targets of frivolous or malicious suits need not bear the expense of responding.'" *Nordstrom v. Ryan*, 762 F.3d 903, 920 n. 1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
 23 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

24 "The standard for determining whether a plaintiff has failed to state a claim upon
 25 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
 26 Civil Procedure 12(b)(6) standard for failure to state a claim." *Watison v. Carter*, 668
 27 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
 28

1 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
 2 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
 3 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
 4 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
 5 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

6 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
 7 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
 8 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
 9 relief [is] . . . a context-specific task that requires the reviewing court to draw on its
 10 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
 11 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
 12 this plausibility standard. *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969
 13 (9th Cir. 2009).

14 **A. 42 U.S.C. § 1983**

15 Title 42 U.S.C. § 1983 provides a cause of action for the “deprivation of any rights,
 16 privileges, or immunities secured by the Constitution and laws” of the United States.
 17 *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). To state a claim under § 1983, a plaintiff must
 18 allege two essential elements: (1) that a right secured by the Constitution or laws of the
 19 United States was violated, and (2) that the alleged violation was committed by a person
 20 acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. Cty. of*
 21 *Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

22 **B. Plaintiff’s Factual Allegations**

23 On October 17, 2014, Plaintiff alleges he was “involved in a bike lane accident in
 24 the City of Oceanside.” (Compl. at 3.) When Defendant Regalado, a Police Officer for
 25 the City of Oceanside, arrived at the scene of the accident he “deemed the accident to be
 26 all [Plaintiff’s] fault.” (*Id.*) However, Plaintiff claims that the “true cause of the accident
 27 was due to severe road damage in the bike lane.” (*Id.*) Plaintiff claims that City of
 28 Oceanside is “liable for my injuries” because of the condition of the bike lane. (*Id.*) He

1 further claims that the Defendants Torres and Regalado were negligent in their duties as
 2 Police Officers because they used “selective policing” by failing to account for the
 3 condition of the road in their report finding Plaintiff at fault.

4 Plaintiff seeks to hold Defendants liable for the injuries he sustained in this
 5 accident by claiming his civil rights were violated. Specifically, Plaintiff seeks damages
 6 for alleged violations of due process, access to courts and cruel and unusual punishment.
 7 (*See* Compl. at 3-6.)

8 **C. Due Process and Eighth Amendment Claims**

9 While Plaintiff purports to bring a claim under the Eighth Amendment, Plaintiff
 10 was not a prisoner at the time the events giving rise to his claims occurred. Thus, while
 11 Plaintiff cannot bring an Eighth Amendment claim, the Court will consider his claims
 12 brought pursuant to the Fourteenth Amendment. *See Frost v. Agnos*, 152 F.3d 1124,
 13 1128 (9th Cir. 1998) (“Because pretrial detainees’ rights under the Fourteenth
 14 Amendment are comparable to prisoners’ rights under the Eighth Amendment . . . we
 15 apply the same standards.”)

16 The crux of Plaintiff’s claims against the City of Oceanside revolve around the
 17 alleged failure on the part of the City to properly maintain and repair damage to the
 18 roads. (*See* Compl. at 5.) He further claims that the Defendants, police officers for the
 19 City of Oceanside, who wrote the report following Plaintiff’s accident “turned a blind
 20 eye” to the conditions of the roads. (*Id.*) These claims do not rise to the level of an
 21 actual constitutional claim but rather sound in negligence which is a state tort claim. The
 22 United States Supreme Court has “made it clear that the due process guarantee does not
 23 entail a body of constitutional law imposing liability whenever someone cloaked with
 24 state authority causes harm.” *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998).
 25 In any § 1983 action, “the plaintiff still must prove a violation of the underlying
 26 constitutional right; and depending on the right; merely negligent conduct may not be
 27 enough to state a claim.” *Daniels v. Williams*, 474 U.S. 327, 330 (1986). In *Daniels*, the
 28 Supreme Court held that a lack of care “does not implicate the Due Process Clause of the

1 Fourteenth Amendment.” *Id.* at 334. Here, the Court finds that Plaintiff’s claims,
 2 regarding the alleged lack of care in maintaining the roads and Defendants’ determination
 3 of fault with regard to the accident that occurred, clearly sound in negligence and do not
 4 rise to the level of a constitutional violation.

5 Thus, the Court DISMISSES Plaintiff’s Eighth and Fourteenth Amendment claims
 6 for failing to state a claim upon which relief may be granted.

7 **E. Access to Courts**

8 Plaintiff also refers to “freedom of travel (access to courts)” but it is not clear what
 9 specific allegation forms the basis of this claim. To the extent that he is attempting to
 10 allege an access to courts claim, the Court finds, for the reasons set forth below, that he
 11 has failed to state a claim upon which relief may be granted.

12 Prisoners have a constitutional right to access to the courts. *Lewis v. Casey*, 518
 13 U.S. 343, 346 (1996). The right is limited to the filing of direct criminal appeals, habeas
 14 petitions, and civil rights actions. *Id.* at 354. Claims for denial of access to the courts may
 15 arise from the frustration or hindrance of “a litigating opportunity yet to be gained”
 16 (forward-looking access claim) or from the loss of a suit that cannot now be tried
 17 (backward-looking claim). *Christopher v. Harbury*, 536 U.S. 403, 412-15 (2002); *see*
 18 *also Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011). (differentiating “between
 19 two types of access to court claims: those involving prisoners’ right to affirmative
 20 assistance and those involving prisoners’ rights to litigate without active interference”).

21 However, Plaintiff must allege “actual injury” as the threshold requirement to any
 22 access to courts claim. *Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. An “actual
 23 injury” is “actual prejudice with respect to contemplated or existing litigation, such as the
 24 inability to meet a filing deadline or to present a claim.” *Lewis*, 518 U.S. at 348; *see also*
 25 *Jones v. Blanas*, 393 F.3d 918, 936 (9th Cir. 2004) (defining actual injury as the
 26 “inability to file a complaint or defend against a charge”). The failure to allege an actual
 27 injury is “fatal.” *Alvarez v. Hill*, 518 F.3d 1152, 1155 n. 1 (9th Cir. 2008) (“Failure to
 28 show that a ‘non-frivolous legal claim had been frustrated’ is fatal.”) (quoting *Lewis*, 518

1 U.S. at 353 & n. 4).

2 In addition, Plaintiff must allege the loss of a “non-frivolous” or “arguable”
3 underlying claim. *Harbury*, 536 U.S. at 413-14. The nature and description of the
4 underlying claim must be set forth in the pleading “as if it were being independently
5 pursued.” *Id.* at 417. Finally, Plaintiff must specifically allege the “remedy that may be
6 awarded as recompense but not otherwise available in some suit that may yet be
7 brought.” *Id.* at 415.

8 Plaintiff’s Complaint fails to allege the actual injury required to state an access to
9 courts claim. *See Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. Plaintiff failed to
10 include any “factual matter” to show how or why any individual Defendant in this case
11 caused him to suffer any “actual prejudice” “such as the inability to meet a filing deadline
12 or to present a claim,” with respect to that case. *Lewis*, 518 U.S. at 348; *Jones*, 393 F.3d
13 at 936; *Iqbal*, 556 U.S. at 678. There is no adverse event that Plaintiff links to any action
14 on the part of Defendants.

15 Thus, because Plaintiff has failed to allege facts sufficient to show that Plaintiff
16 suffered any “actual injury” with respect to the case, or any other non-frivolous direct
17 criminal appeal, habeas petition, or civil rights action he may have filed, *see Lewis*, 518
18 U.S. at 354, the Court finds Plaintiff’s access to courts claims must be dismissed for
19 failing to state a plausible claim upon which § 1983 relief can be granted. *See* 28 U.S.C.
20 § 1915(e)(2)(B)(ii), § 1915A(b)(1); *Iqbal*, 556 U.S. at 678.

21 **F. Leave to Amend**

22 A pro se litigant must be given leave to amend his or her complaint to state a claim
23 unless it is absolutely clear the deficiencies of the complaint cannot be cured by
24 amendment. *See Lopez*, 203 F.3d at 1130 (noting leave to amend should be granted when
25 a complaint is dismissed under 28 U.S.C. § 1915(e) “if it appears at all possible that the
26 plaintiff can correct the defect”). Therefore, while the Court finds Plaintiff’s Complaint
27 fails to state any claim upon which relief can be granted, it will provide him a chance to
28 fix the pleading deficiencies discussed in this Order.

III. Conclusion

For all the reasons discussed, the Court:

1. **GRANTS** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from Plaintiff's trust account the \$350 filing fee owed in this case by garnishing monthly payments from his account in an amount equal to twenty percent (20%) of the preceding month's income and forwarding those payments to the Clerk of the Court each time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

4. **DISMISSES** Plaintiff's Complaint for failing to state a claim upon which § 1983 relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

5. **GRANTS** Plaintiff forty-five (45) days leave to file an Amended Complaint which cures all the deficiencies of pleading described in this Order. Plaintiff is cautioned, however, that should he choose to file an Amended Complaint, it must be complete by itself, comply with Federal Rule of Civil Procedure 8(a), and that any claim not re-alleged will be considered waived. *See* S.D. Cal. Civ. L.R. 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended pleading supersedes the original."); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an amended pleading may be "considered waived if not repled.").


If Plaintiff fails to follow these instructions and/or files an Amended Complaint that still fails to state a claim, his case may be dismissed without further leave to amend. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) ("If a plaintiff does not take advantage of the opportunity to fix his complaint, a district court may convert the

1 dismissal of the complaint into dismissal of the entire action.”).

2 6. The Clerk of Court is directed to mail Plaintiff a blank court approved
3 § 1983 civil rights complaint form.

4 **IT IS SO ORDERED.**

5
6 **DATED: August 17, 2016**

7 
8 **Hon. Cynthia Bashant**
9 **United States District Judge**